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In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES DEPARTMENT OF JUSTICE,
IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

JOSEPH PATRICK DOHERTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Attorney General is prohibited from considering the United States' measures to combat terrorism, and other foreign policy concerns, when he exercises his discretion to grant or deny asylum to an alien under 8 U.S.C. 1158(a).

2. Whether the Attorney General properly declined to reopen respondent's deportation proceedings to allow him to apply for withholding of deportation to the United Kingdom, on the ground that the existing record established that he would be ineligible for that relief under statutory exceptions because he committed serious crimes in the United Kingdom and was actively involved in the Provisional Irish Republican Army, a terrorist organization.

3. Whether the Attorney General abused his discretion in deciding that reopening of respondent's deportation proceedings to allow him to apply for asylum and withholding of deportation was not warranted by, *inter alia,* the Attorney General's final decision in the deportation proceedings themselves (which rejected respondent's position on a disputed issue) or a change in foreign law.

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v.

JOSEPH PATRICK DOHERTY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States Department of Justice, Immigration and Naturalization Service (INS), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-45a)[1] is reported at 908 F.2d 1108. The opinions and orders of the Attorney General (App. 46a-91a, 116a-130a), the Board of Immigration Appeals (App. 92a-115a, 131a-133a, 134a-147a, 148a-155a), and the immigration judge (App. 156a-159a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1990. App. 160a. A timely petition for rehearing was denied on September 13, 1990. App. 161a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] "App." refers to the separately bound appendix to this petition for a writ of certiorari.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Immigration and Nationality Act of 1952, 8 U.S.C. 1101 *et seq.*, and implementing regulations are set forth at App. 162a-166a.

STATEMENT

1. Respondent is a native of Northern Ireland, a citizen of the United Kingdom, and a member of the terrorist organization known as the Provisional Irish Republican Army (PIRA). Before illegally entering the United States in 1982, respondent had an extensive criminal record in Northern Ireland, beginning with convictions as a juvenile for burglary and larceny.[2] On May 2, 1980, respondent and three other PIRA members drove in a hijacked van to a private house in North Belfast, while the van driver was held captive; they seized the house and, from it, attacked a car full of British soldiers, killing a British officer. Respondent was arrested and tried in Belfast. After the close of evidence but prior to verdict, respondent and seven others escaped from a maximum security prison. On June 12, 1981, respondent was convicted *in absentia* of murder, attempted murder, illegal possession of firearms and ammunition, and belonging to the Irish Republican Army, a proscribed organization. He was sentenced to life imprisonment. App. 2a, 46a-47a, 84a-88a.

2. In early 1982, respondent entered the United States under an alias. On June 18, 1983, he was arrested by INS agents while working at a bar in Manhattan. INS immediately instituted deportation proceedings, whereupon respondent applied for asylum under Section 208 of the Immigration and Nationality Act, 8 U.S.C. 1158. App. 3a, 157a; C.A. App. 1-13.[3]

[2] He was later convicted in 1973 of possessing a firearm and in 1974 of possessing 80 pounds of explosives. He was sentenced to 10 years' imprisonment for the latter crime and then was convicted of attempted prison escape. Pet. App. 46a-47a.

At his deportation hearing in September 1986, respondent withdrew his application for asylum, waived his right to seek that relief, disavowed any intention to seek withholding of deportation under Section 243(h) of the Act, 8 U.S.C. 1253(h), and admitted that he was deportable. App. 49a-50a.[4] Under Section 243(a) of the Act, an alien is to be deported to the country he designates, "unless the Attorney General, in his discretion, concludes that deportation to such country would be prejudicial to the interests of the United States." 8 U.S.C. 1253(a). Respondent designated Ireland, but INS objected on the ground that he might avoid punishment there, which would be "prejudicial to the interests of the United States" in combatting terrorism. The immigration judge nevertheless

[3] In August 1983, at the request of the United Kingdom, the United States sought extradition of respondent. On December 12, 1984, Judge Sprizzo denied the application, holding that respondent's crimes fell within the exception in the extradition treaty between the two countries for offenses of a "political character." *In re Requested Extradition of Doherty*, 599 F. Supp. 270, 272 (S.D.N.Y. 1984). That order was not appealable, and the government's attempt to obtain collateral review of it in a declaratory judgment action was unsuccessful. *United States* v. *Doherty*, 615 F. Supp. 755 (S.D.N.Y. 1985), aff'd, 786 F.2d 491 (2d Cir. 1986).

[4] Respondent admitted that he had entered the United States without valid immigration documents, in violation of 8 U.S.C. 1182(a)(20). His admissions also established that he was deportable under 8 U.S.C. 1182(a)(19) because he obtained entry by fraud or willful misrepresentation. App. 149a. Respondent did not admit the additional charges that he was deportable because he had been convicted of a crime of moral turpitude and two crimes with an aggregate sentence of five years or more; entered the United States to engage in activities prejudicial to the public interest or endangering the safety, welfare, or security of the United States; and advocated the unlawful assaulting or killing of officers of an organized government. 8 U.S.C. 1182(a)(9), (10), (27) and (28)(F)(ii).

ordered respondent deported to Ireland, App. 156a-159a,[5] and the Board of Immigration Appeals (BIA) affirmed. *Id.* at 148a-155a.

The case then was certified to the Attorney General, pursuant to 8 C.F.R. 3.1(h). On June 9, 1988, Attorney General Meese reversed the BIA's decision and ordered respondent deported to the United Kingdom. App. 116a-130a. He concluded that deporting respondent to Ireland would be "prejudicial to the interests of the United States" because it would conflict with the policy of the United States to ensure that individuals who commit acts of violence against democratic states are punished quickly and lawfully, would undermine the United Kingdom's "confidence in the ability of the United States to cooperate in counter-terrorism efforts of special bilateral concern," and "might well prejudice broader aspects of our bilateral relationship." *Id.* at 126a-127a.

3. While the matter was pending before Attorney General Meese, respondent moved to withdraw his designation of Ireland and designate another country, and to reopen the proceedings so that he could apply for asylum and withholding of deportation. As grounds for this motion, respondent asserted that an Irish Extradition Act, which became effective on December 1, 1987, would result in his extradition to the United Kingdom if he were deported to Ireland. C.A. App. 364-365, 372-373. The BIA declined to allow respondent to make a redesignation. But by a 3-2

[5] Four days after the immigration judge's decision, respondent filed a habeas corpus petition seeking immediate deportation to Ireland. His petition was denied. *Doherty* v. *Meese*, 808 F.2d 938 (2d Cir. 1986). The court of appeals noted that respondent sought this relief because of a supplementary extradition treaty between the United States and the United Kingdom, which had been ratified by the Senate and was then pending before the British House of Commons. As relevant here, the supplementary treaty eliminated the "political offense" exception, on which Judge Sprizzo had relied in declining to authorize extradition of respondent. 808 F.2d at 940; see note 3, *supra*.

vote, the BIA granted his motion to reopen, albeit on a different ground: although the INS had taken the position from the outset that respondent should be deported to the United Kingdom rather than Ireland, the BIA was of the view that respondent "could not have been expected to anticipate that he would not be deported to his country of choice," and that his failure to file for asylum at an earlier date was "excusable" for this reason. App. 99a; see *id.* at 92a-115a.

4. The case was once again certified to the Attorney General. On June 30, 1989, Attorney General Thornburgh disapproved the BIA's order and denied respondent's motion to reopen for three separate reasons. App. 46a-91a.[6]

First, Attorney General Thornburgh rejected the BIA's notion that reopening was justified because Attorney General Meese refused to accede to respondent's request that he be deported to Ireland. App. 58a-59a, 65a-67a. He found it "unlikely" that the Attorney General's invocation of his express statutory authority to reject a deportee's designation could "ever constitute new evidence," but reasoned that "[i]t certainly cannot properly be considered new evidence where, as here, deportation to the country designated by the alien has been vigorously contested throughout the proceedings by the federal Government; it has been represented that there is interest at the highest levels of the Government that the alien not be deported to the country designated; and the Attorney General ultimately concludes that the national interest should prevail." *Id.* at 58a-59a. Furthermore, the Attorney General concluded, "[t]he ultimate decision in an administrative process cannot itself constitute 'new' evidence to justify reopening"; otherwise, "there could never be finality in the process." *Id.* at 67a.

[6] The Attorney General found it unnecessary to decide whether respondent had established a prima facie case of eligibility for asylum or withholding of deportation, noting that he had discretion to deny reopening even if respondent had done so. App. 64a-65a n.21 (citing *INS* v. *Abudu*, 485 U.S. 94 (1988)).

The Attorney General similarly concluded that Ireland's 1987 Extradition Act, which gave effect to the European Convention on the Suppression of Terrorism, did not warrant reopening. App. 59a, 67a-74a; C.A. App. 459-467. He found this event to be "neither sudden nor unforeseeable," since Ireland had signed the Convention in February 1986, "more than six months *before* respondent withdrew his applications for asylum and for withholding of deportation." App. at 67a-68a.[7]

Second, the Attorney General determined that respondent had knowingly and intelligently waived any claim to asylum or withholding of deportation at his September 1986 hearing. App. 60a, 79a-81a. He found the waiver to be "part of a calculated plan to [try to] ensure immediate deportation to Ireland before the United Kingdom ratified its [supplementary extradition] treaty with the United States, which would have allowed [respondent] to be extradited directly to the United Kingdom." *Id.* at 60a; see note 5, *supra*. In the Attorney General's judgment, respondent assumed the risk that his tactical choice might not succeed, and "the interests in the integrity of the administrative process and finality of decision"—and in preventing manipulation of the regulatory process—required that his waiver be given effect. App. 79a, 81a.

Third, the Attorney General denied reopening on the ground that respondent would not ultimately be granted asylum or withholding of deportation. App. 60a-61a, 81a-91a. The Attorney General decided, in his discretion, that he would not grant respondent asylum, citing a number of reasons: (i) "it is the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment"; (ii) "the United States Government, through the State Department, has specifically determined that it is in the foreign policy interest of this country that respondent be deported to the United Kingdom"; (iii) "respondent knowingly and intentionally waived his claim to asylum"; and (iv) respondent's "membership in and assistance of the PIRA in its acts of persecution, and the nature and number of his criminal acts in general, * * * suggest that he is not deserving of equitable relief." App. 82a.

Similarly, the Attorney General found respondent ineligible for withholding of deportation under two statutory exceptions, even assuming he would otherwise qualify for that relief. First, the Attorney General found "serious reasons for considering that the alien has committed a serious nonpolitical crime outside of the United States" (8 U.S.C. 1253(h)(2)(C)), based both on the crimes respondent indisputably committed, and on probable cause to believe that he committed other violent crimes against innocent civilians as an active member of the PIRA, which the United States officially regards as a terrorist organization. App. 83a-88a & n.50, 89a. The Attorney General also found respondent ineligible because, through his active role in the PIRA—serving as an officer, gathering ammunition, distributing arms, and training and drilling other PIRA members—he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion" (8 U.S.C. 1253(h)(2)(A)). App. 89a-91a.

5. The court of appeals sustained Attorney General Meese's order directing respondent's deportation to the United Kingdom, but set aside Attorney General Thornburgh's order denying respondent's motion to reopen the proceedings. App. 1a-45a.

[7] The Attorney General further held that the Extradition Act did not in any event warrant reopening, because (i) that Act did not alter the provisions of U.S. immigration law governing respondent's deportation (App. 69a-70a); (ii) respondent was subject to extradition from Ireland to the United Kingdom even before the new Extradition Act, a point respondent himself previously had made in urging affirmance of the immigration judge's order (*id.* at 70a-72a); and (iii) any change in Irish law was irrelevant because Attorney General Meese had decided (and Attorney General Thornburgh agreed) that respondent should be deported to the United Kingdom, not Ireland (*id.* at 74a).

a. In unanimously sustaining Attorney General Meese's order, App. 7a-9a, the court held that Section 243(a) of the Act confers "broad discretion" to decide what is prejudicial to national interests, which "requires an essentially political determination" that is "essentially unreviewable" by a court. *Id.* at 8a. The court accepted Attorney General Meese's explanation that "deporting [respondent] to the Republic of Ireland, indeed anywhere but the United Kingdom, would harm our relationship with the United Kingdom and would contradict our policy of punishing violence against democratic nations." *Id.* at 9a. In the court's view, "[j]udgments of this nature are surely within the scope of the attorney general's discretion under § 243(a)," and it was "not entitled to second-guess them." *Ibid.*

b. By contrast, the court, over Judge Lumbard's dissent, set aside Attorney General Thornburgh's order denying respondent's motion to reopen, holding, *inter alia,* that the Attorney General could not consider these same anti-terrorism and other foreign policy factors when passing on respondent's asylum request. App. 9a-29a. The court began by referring to the three situations discussed in *INS* v. *Abudu,* 485 U.S. 94 (1988), in which a motion to reopen for the purpose of applying for asylum or withholding of deportation may be denied. But unlike this Court in *Abudu,* it regarded those situations as exclusive. App. 11a-12a.[8]

[8] In *Abudu,* the Court stated (485 U.S. at 104-105):

> There are at least three independent grounds on which the BIA may deny a motion to reopen. First, it may hold that the movant has not established a prima facie case for the underlying substantive relief sought. * * * Second, the BIA may hold that the movant has not introduced previously unavailable, material evidence, 8 CFR § 3.2 (1987), or, in an asylum application case, that the movant has not reasonably explained his failure to apply for asylum initially, 8 CFR § 208.11 (1987). * * * Third, in cases in which the ultimate grant of relief is discretionary (asylum, suspension of deportation, and adjustment of status, but not withholding of deportation), the BIA may leap ahead, as it were, over the two threshold concerns (prima facie case and new evidence/reasonable explanation), and simply determine that, even if they were met, the movant would not be entitled to the discretionary grant of relief.

i. The court first noted that Attorney General Thornburgh did not base his decision on a finding that respondent failed to establish a prima facie case for substantive relief. See note 6, *supra.* It therefore assumed for purposes of the appeal that respondent had satisfied that burden. App. 15a.

ii. The court next held that the Irish Extradition Act and Attorney General Meese's decision satisfied respondent's burden of producing "previously unavailable, material evidence" or a "reasonable explanation" for why he had not theretofore requested asylum or withholding of deportation. App. 12a-15a. The court ruled that Attorney General Thornburgh should not have looked to whether those events were foreseeable when respondent waived his right to seek that relief, because, in its view, an alien should not have to consider anything beyond the facts and law in existence when he makes such a tactical decision. *Id.* at 13a.[9] The court also questioned whether Attorney General Meese's decision was forseeable: it acknowledged that the Attorney General's power to reject an alien's designation is "expressly conferred by the statute to be sure," but it believed that because this power had not previously been exercised, respondent had a "reasonable expectation" that he would be deported to Ireland. *Id.* at 14a. In addition, the court faulted the Attorney General for taking a different view of the facts than the BIA, and it deferred to the BIA's judg-

[9] The court also refused to accept the Attorney General's conclusion that respondent waived his right to apply for asylum and withholding of deportation in 1986, and thereby assumed the risk that the Attorney General might reject his designation of Ireland or that Ireland might amend its extradition laws. App. 27a-28a. The court did not disagree with the Attorney General's finding that these were "deliberate tactical decisions" by respondent, but it found the Attorney General's concern for the "integrity of the administrative process" insufficient to justify his denial of reopening. *Ibid.*

ment, rather than that of the Attorney General, on the theory that the BIA has experience in identifying meritorious cases. *Ibid.*

iii. The court further held that Attorney General Thornburgh erred in deciding that respondent would not ultimately obtain asylum or withholding of deportation. App. 15a-27a. With respect to asylum, the court held that the Attorney General could not base his denial of relief on the United States' policy that those who commit acts of violence against a democratic state should receive prompt and lawful punishment or on other foreign policy interests. *Id.* at 17a-27a. It acknowledged that these same factors were "clearly relevant" to Attorney General Meese's disapproval of respondent's designation of Ireland as the country of deportation, *id.* at 26a, and that the Attorney General has "broad discretion to base other types of immigration decisions on factors such as the government's political and foreign policy interests." *Id.* at 18a. But it found these to be "improper factors" in the asylum context. *ibid.* The court pointed to no preclusion of such factors in the text of Section 208, which, it recognized (App. 17a-18a), broadly provides that an alien who satisfies the threshold requirement of being a refugee "may" be granted asylum "in the discretion of the Attorney General." 8 U.S.C. 1158(a). Instead, in holding that the Attorney General has a "more limited role" and only "limited discretion" in asylum cases, the court relied on what it regarded as the "spirit" of the Refugee Act of 1980 (Pub. L. No. 96-212, 94 Stat. 102), drawn from its legislative history, App. 19a-25a, and on deference to the BIA's practice in prior asylum cases. *Id.* at 24a-25a.

With respect to withholding of deportation, the court held that the Attorney General could not rely on the two exceptions to that relief without affording respondent a hearing. App. 15a-17a. The court believed that the Attorney General's power to deny a motion to reopen based on factors other than the alien's failure to establish a prima facie

case or lack of new evidence is limited to cases in which the ultimate relief is discretionary, and that he therefore "simply has no discretion" to deny relief based on a finding of ineligibility for withholding of deportation. *Id.* at 16a.

c. Judge Lumbard dissented. App. 29a-45a. He stressed that reopening is "committed to the Attorney General's discretion" and " 'disfavored in deportation proceedings,' " *id.* at 31a-32a (quoting *Abudu,* 485 U.S. at 107), and that "[w]hen the Attorney General decides, after a careful review of the voluminous record, that a drawn-out case such as this one no longer merits attention, we are in no position to contradict that judgment." App. 33a. Judge Lumbard also criticized the majority for according more deference to the BIA than to the Attorney General, because "[m]atters which concern asylum and deportation are primarily matters of foreign policy and political judgment," and "[t]he Attorney General has ultimate authority in such matters, not the members of an inferior Board." *Id.* at 34a. And Judge Lumbard questioned whether the *Abudu* analysis applies here, because its reasons for denying reopening were "clearly not meant to be exhaustive." *Id.* at 34a-35a. Even on the premise that the *Abudu* framework controlled, however, he believed the Attorney General had properly denied reopening.

First, Judge Lumbard disputed the majority's holdings that the Attorney General may not take anti-terrorism or other foreign policy concerns into account in exercising his discretion on asylum requests, and that his authority to deny asylum to eligible aliens "is limited to a narrow class of cases." App. 37a. He noted that "[w]hile Congress has established rules for determining who is eligible for asylum, it has created no rules for determining who among those eligible for asylum should receive that relief," instead committing that determination to 'the discretion of the Attorney General.'" *Ibid.* (quoting 8 U.S.C. 1158(a)). In Judge Lumbard's view, this is "the broadest language possible," and, if anything, it affords the Attorney General wider

latitude than he has to reject an alien's designation of the country of deportation under Section 243(a), under which the majority sustained the Attorney General's consideration of anti-terrorism policies and foreign relations. App. 36a-37a. Judge Lumbard also found it significant that "Congress specifically rejected making asylum mandatory upon the appropriate showing," which demonstrates that "[i]f Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so." *Id.* at 36a.

Second, Judge Lumbard rejected the notion that Attorney General Meese's decision and the Irish Extradition Act required reopening. App. 38a-41a. He analogized respondent's position to that of a criminal defendant who cannot withdraw a guilty plea "merely because he discovers long after the plea has been accepted that his calculus misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Id.* at 40a (quoting *Brady* v. *United States,* 397 U.S. 742, 757 (1970)). Judge Lumbard also believed that Attorney General Meese's decision could not be regarded as either "new" or "evidence," since it was the final administrative decision in respondent's case, and that the Extradition Act—"if it [was] evidence at all"—was not "new," in light of the Attorney General's finding that respondent "was extraditable from the Republic of Ireland to the United Kingdom even prior to December 1, 1987 on the basis of longstanding provisions of Irish law." App. 40a-41a.

Third, Judge Lumbard would have sustained the Attorney General's finding that respondent is ineligible for withholding of deportation under two exceptions to that relief. App. 42a-45a. Here, Judge Lumbard reasoned, "[s]ince the record is replete with [respondent's] admissions of actions constituting violations of § 243(h)(2), and since the Attorney General's determination that [respondent] failed the test in subsection (C) is a model of a reasoned decision based on the record, * * * he properly denied the motion to reopen to the extent it was for the purpose of applying for withholding." App. 42a-43a.

REASONS FOR GRANTING THE PETITION

This case presents important questions concerning the authority of the Attorney General to act in the national interest in asylum and deportation matters. The court of appeals' decision—holding that the Attorney General abused his discretion in declining to reopen deportation proceedings to consider an asylum application by a convicted murderer and member of a terrorist organization—is unprecedented. The court's holding that the Attorney General may not consider the Nation's policies regarding terrorism and other foreign relations concerns in exercising his discretion to grant or deny asylum cannot be reconciled with the text of Section 208(a) of the Immigration and Nationality Act, which confers unqualified discretion on the Attorney General; with the text and background of other provisions of the Act; or with this Court's decision in *INS* v. *Cardoza-Fonseca,* 480 U.S. 421 (1987), and other decisions affirming the role of foreign policy considerations in this area. In addition, it threatens to undermine the Executive Branch's ability to take account of important foreign relations and national security concerns in the Nation's refugee policies, to promote respect for the rule of law and democratic institutions in world affairs, and to advance forceful and credible measures to combat terrorism.

The decision below also impermissibly intrudes into the Attorney General's discretion in the administration of the immigration laws by engaging in essentially de novo review of his rulings on motions to reopen deportation proceedings. This approach to judicial review is inconsistent with numerous decisions of this Court, most recently *INS* v. *Abudu,* 485 U.S. 94 (1988). It invites disruption and delay of deportation proceedings by encouraging resort to the extraordinary remedy of reopening on the basis of unrelated rulings or tangential developments that have no bearing on the merits of a claim. Review by this Court therefore is warranted.

1. The court of appeals held that in deciding whether to grant asylum to an alien, the Attorney General has only a "limited role" and "limited discretion," App. 25a, and cannot consider "factors such as the government's geopolitical and foreign policy interests"—including "the policy of the United States that those who commit acts of violence against a democratic state should receive prompt and lawful punishment." *Id.* at 21a, 26a. These are unprecedented and erroneous limitations on the Attorney General's discretion. The support of democratic governments and the rule of law—and the denunciation of terrorism—are central to this Nation's foreign policy.[10] It is inconceivable that Congress intended to require the Attorney General to ignore such basic principles when deciding whether to grant an alien "so great a privilege as asylum in the United States." *Id.* at 38a n.3 (Lumbard, J., dissenting).

a. Nothing in the text of Section 208(a) supports such a result. Section 208(a) provides that an alien "may be granted asylum in the discretion of the Attorney General if the Attorney General determines that he is a refugee within the meaning of section 1101(a)(42)(A) of this title." 8 U.S.C. 1158(a). Although "refugee" status is a necessary condition for asylum, such status does not entitle an alien to relief; that is a matter expressly committed to the Attorney General's discretion. Moreover, although the Act contains standards to guide the Attorney General's determination of whether an alien is a refugee for these purposes (see 8 U.S.C. 1101(a)(42)(A)), and thereby limits his discretion to *grant* asylum, it does not contain any standards limiting the Attorney General's discretion to *deny* asylum. The statutory conferral of discretion in this respect is unqualified. There is thus no textual basis for the narrow ambit of discretion to which the court of appeals has confined the Attorney General in asylum cases.

[10] As former Secretary of State George Shultz stated, in materials made part of the record in this case: "[D]emocracy rejects indiscriminate or improper use of force and relies instead on the peaceful settlement of disputes through legitimate political processes. * * * [W]e seek to build a world which holds no place for terrorist violence, a world in which human rights are respected by all governments, a world based on the rule of law." C.A. App. 137. For these reasons, "terrorists * * * are ideological enemies of the United States." *Ibid.*

b. Nor is there any support for the court of appeals' ruling in this Court's decisions construing Section 208(a). The Court stressed in *Cardoza-Fonseca* that "[t]he Attorney General is *not required* to grant asylum to everyone who meets the definition of refugee," and that "a finding that an alien is a refugee does no more than establish that 'the alien *may* be granted asylum *in the discretion of the Attorney General.*' " 480 U.S. at 428 n.5 (1987) (quoting Section 208(a)). The Court cited its similar observation in *INS* v. *Stevic*, 467 U.S. 407, 423 n.18 (1984), that "[m]eeting the definition of 'refugee' * * * does *not* entitle the alien to asylum—the decision to grant a particular application rests in the discretion of the Attorney General under § 208(a)." As the emphasis supplied by the Court in both cases suggests, these statements were integral to the Court's explanation of the place of Section 208(a) in the statutory scheme.

The Court in *Cardoza-Fonseca* contrasted Section 208(a) to Section 243(h) of the Act, which provides for withholding of deportation of a refugee to a country where his "life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion." Section 243(h) implements the *nonrefoulment* requirement in Article 33.1 of the United Nations Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150, 176, to which the United States is bound by accession to the United Nations Protocol Relating to the Status of Refugees, Nov. 1,

1968, 19 U.S.T. 6223, T.I.A.S. No. 6577. Withholding of deportation is mandatory, but it is "country specific" and does not bar deportation to a third country. *Cardoza-Fonseca,* 480 U.S. at 428 n.6, 429 & n.7, 440-441; *Stevic,* 467 U.S. at 416.

Asylum "is a greater form of relief," because "[w]hen granted asylum the alien may be eligible for adjustment of status to that of a lawful permanent resident pursuant to section 209 of the Act, 8 U.S.C. 1159, after residing here one year, subject to numerical limitations and the applicable regulations." 480 U.S. at 428-429 n.6. In contrast to Section 243(h), Section 208(a) establishes a "discretionary mechanism which gives the Attorney General the *authority* to grant the broader relief of asylum to refugees." 480 U.S. at 441. This contrast follows from the fact that Section 208(a) implements not the mandatory provisions of Article 33 of the United Nations Convention, but "instead corresponds to Article 34," which "provides that the contracting States 'shall as far as possible facilitate the assimilation and naturalization of refugees.' " 480 U.S. at 441. The Court pointed out in *Cardoza-Fonseca* that Article 34 only "provides for a precatory, or discretionary benefit" for persons found to be refugees and is "[l]ike § 208(a)" in this respect. 480 U.S. at 441. In short, Section 208(a) does no more than establish a "discretionary mechanism" by which Executive Branch officials may implement a provision of the Convention that is itself "precatory" and "discretionary"; it therefore should not be construed to impose rigid, judicially enforceable limitations on the Attorney General's discretion to deny asylum to a particular alien.

c. The court of appeals' holding is all the more anomalous in light of the court's ruling that the Attorney General properly rejected respondent's designation of Ireland as the country of deportation under Section 243(a), based on a consideration of the same anti-terrorism and other

foreign policy concerns that it found wholly impermissible in the asylum context. App. 7a-9a. As Judge Lumbard explained, *id.* at 36a-37a, a comparison of the text of Sections 208(a) and 243(a) does not suggest such dramatically different outcomes. Both Sections commit the ultimate decision to the "discretion" of the Attorney General, subject only to his finding that a specified threshold requirement is satisfied—that the alien is a "refugee," or that deportation to the designated country would be "prejudicial to the interests of the United States." *Ibid.*

d. In the end, in imposing judicially created limitations on the Attorney General's discretion, the court of appeals relied entirely on inferences it drew from the legislative history of the Refugee Act of 1980. App. 20a-21a, 23a-24a. That tack reflected a grave interpretive error. As this Court has said with specific reference to Section 208(a), there is a "strong presumption that Congress expresses its intent through the language it chooses," and the plain import of that language (here, an unqualified grant of discretion) can be overcome, if at all, only by finding a "clearly expressed legislative intention" to the contrary. *Cardoza-Fonseca,* 480 U.S. at 432 n.12. That daunting standard was not met even under the court of appeals' view of the legislative history, because the court itself found "some ambiguity" on the issue. App. 24a. In any event, the court seriously misunderstood the background of the Act.

The Refugee Act, in the court's view, eliminated the Attorney General's discretion to consider "geopolitical and foreign policy interests" because *eligibility* for asylum is established, through the definition of the term "refugee," in "politically neutral terms." App. 21a. But this analysis ignores the fact that the statute does not provide that those who meet the definition are *entitled* to asylum. What is more, the legislative history discussed in the materials

cited by the court of appeals[11] did not involve Section 208(a). Rather, it concerned Congress's removal of the prior ideological and geographical restrictions on eligibility for conditional entry of aliens outside the United States under former Section 203(a)(7)(A)(i) of the Act, 8 U.S.C. 1153(a)(7)(A)(i) (1976), which applied only to aliens from Communist countries or the Middle East. In the Refugee Act, Congress replaced that provision with a new Section 207, 8 U.S.C. 1157, which provides for the admission of "refugees" from outside the United States, subject to flexible numerical limitations, and permits the Attorney General, in his "discretion," to admit such a refugee. 8 U.S.C. 1157(c)(1).

As under Section 208(a), the fact that Congress, by its definition of the term "refugee," removed the ideological and geographical restrictions on the aliens who are *eligible* for the exercise of the Attorney General's discretion under Section 207 does not support the court of appeals' far different and more sweeping proposition that Congress imposed strict limitations on the authority of the Attorney General to decide who among eligible refugees will be *admitted*—and, in particular, that Congress precluded all consideration of anti-terrorism and other foreign policy concerns. That proposition cannot be squared with the text of Section 207 itself, which specifically identifies "the foreign policy interests of the United States" as a proper factor to consider in admitting refugees, 8 U.S.C. 1157(e)(6).[12] The court of appeals also overlooked another

[11] See App. 21a (citing *Stevic*, 467 U.S. at 425-427; S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979); and Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980*, 19 San Diego L. Rev. 9, 36 (1981)).

[12] As the Chairman of the House Committee on Foreign Affairs stated, in supporting the Refugee Act, "the determination of the numbers and kinds of refugees to be admitted to the United States are issues involving U.S. foreign policy considerations." H.R. Rep. No. 608, 96th Cong., 1st Sess. 8 (1979).

important aspect of the history of the provision—that Congress specifically rejected the Senate proposal to make the granting of asylum *mandatory* upon an appropriate showing of persecution, and instead adopted the House provision committing that decision to the Attorney General's discretion, without statutory qualifications. See *Cardoza-Fonseca*, 480 U.S. at 441-442. Thus, as Judge Lumbard observed, "[i]f Congress had wanted to limit the Attorney General's discretion to deny an asylum application, it knew how to do so." App. 36a.[13]

In addition, the notion that the Attorney General was barred from considering the foreign policy concern that was at the core of his decision in this case—combatting terrorism—is refuted by the basic definition of "refugee" in 8 U.S.C. 1101(a)(42), on which the court of appeals, ironically, placed so much emphasis. That Section provides that the term "does not include any person who ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group, or political opinion." In light of his own past conduct, this description readily embraces respondent. See pages 28-29, *infra*.[14]

[13] The court below also relied on the statement in the House Report that "[t]he Committee intends to monitor closely the Attorney General's implementation of the [asylum] section so as to insure the rights of those it seeks to protect." App. 24a (quoting H.R. Rep. No. 608, *supra*, at 18). Nothing in this statement implies that the Attorney General is barred from taking foreign policy concerns into account. In addition, an expression of intent by a congressional committee to "monitor closely" the exercise of discretion under an Act of Congress—*e.g.*, so that Congress can consider statutory amendments if necessary—furnishes no basis for *judicial* imposition of limitations on the Attorney General's discretion that Congress did not enact into the law.

[14] Even if respondent were, for some reason, not technically covered by this mandatory exclusion, the Attorney General could consider the obvious thrust of the policies that this and similar provisions of the Act embody when deciding, in the exercise of his discretion, whether to grant asylum to someone with respondent's background. See *McMullen*

e. If any doubt remained about the legitimacy of the factors the Attorney General considered, the court of appeals should have deferred to what is, at the very least, a reasonable construction of Section 208(a) by the Attorney General, the official charged by Congress with the administration of the Act under 8 U.S.C. 1103. See *PBGC* v. *LTV Corp.*, 110 S. Ct. 2668, 2676-2677 (1990); *Cardoza-Fonseca*, 480 U.S. at 445-446 & n.29. Far from doing so, however, the court expressly deferred to inferences from BIA decisions in prior asylum cases (which did not involve the question presented here), in *derogation* of the authoritative construction by the Attorney General in this case. App. 24a-25a. This error, which infects other aspects of the court of appeals' opinion as well,[15] greatly subverts the principle of deference; as Judge Lumbard put it, "[t]he Attorney General has ultimate authority in such matters, not the members of an inferior Board." *Id.* at 34a.

f. The court of appeals' ruling conflicts with decisions of this Court recognizing that asylum policies, and immigration policies generally, are inextricably interwoven with the Nation's foreign policy interests. Most recently, in *Abudu*, which likewise concerned asylum, the Court held that the reasons for deference to agency decisions apply with particular force under the immigration laws because "INS officials must exercise especially sensitive political functions that implicate questions of foreign relations." 485 U.S. at 110.[16]

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v. *INS*, 788 F.2d 591, 599-600 (9th Cir. 1986); 8 U.S.C. 1253(h)(2); 8 C.F.R. 208.8(f)(1).

[15] See also App. 14a (faulting the Attorney General for taking a different view of the facts than the BIA and deferring to the BIA, rather than the Attorney General, regarding circumstances warranting reopening); *id.* at 28a (criticizing the Attorney General's invocation of his authority to review the BIA's decisions in this case).

[16] See also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 101-102 n.21 (1976); *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Galvan* v. *Press*, 347

Furthermore, other courts of appeals, while not addressing the precise question of whether the Attorney General may consider the factors on which he relied in this case, have nevertheless made clear that foreign policy concerns are properly and intimately associated with asylum decisions. See *Alvarez-Flores* v. *INS*, 909 F.2d 1, 4 n.1 (1st Cir. 1990) (the "connection of asylum and deportation to issues of foreign policy may counsel special deference to INS decisions"); *M.A.* v. *INS*, 899 F.2d 304, 313-314 (4th Cir. 1990) (en banc) (deferring to agency application of Section 208(a) because "numerous Supreme Court decisions recognize the intimate connection between immigration decisions and foreign policy" committed to the political branches); *Kashani* v. *Nelson*, 793 F.2d 818, 827-828 (7th Cir.) (finding no jurisdiction, but noting that "the District Director's decision whether to grant an asylum request involves considerations of foreign and domestic policy and administrative efficiency and is clearly committed to the political branches of the government"), cert. denied, 479 U.S. 1006 (1986). The decision below is inconsistent with the view of the asylum process expressed by these other courts of appeals.

g. The decision below will, if uncorrected, fundamentally distort the asylum process. It will lead to perverse results, by allowing the Attorney General to deny asylum for the lesser reasons of "administrative fairness and efficiency," App. 24a, but not for far greater reasons of national security or foreign relations. It will undermine the fairness of the Nation's immigration laws—and the perception of such fairness—by conferring special relief on terrorists and convicted criminals who unlawfully enter the United States, while thousands of refugees and others

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U.S. 522, 530 (1954); *Fong Yue Ting* v. *United States*, 149 U.S. 698, 713 (1893).

seeking to enter the United States lawfully must wait their turn abroad. And it will frustrate the Attorney General's ability to administer the asylum process evenhandedly throughout the country, especially since aliens who believe that they may be able to establish refugee status under the relatively lenient standard for showing a "well-founded fear" of persecution can be expected to seek to apply for the broader relief of asylum in the Second Circuit. Furthermore, if the United States can no longer refuse the humanitarian relief of asylum to aliens who have committed acts of terrorism against other democratic nations, the credibility of this Nation's efforts to combat terrorism will be substantially undermined. Review by this Court therefore is warranted.

2. The decision below also fundamentally departs from settled principles governing judicial review of decisions denying motions to reopen deportation proceedings. At his deportation hearing in 1986, respondent withdrew his asylum application and waived his right to seek asylum or withholding of deportation, hoping to bring about his immediate deportation to Ireland before a new extradition treaty between the United States and the United Kingdom came into force. See note 5, *supra*. After that approach failed, respondent repudiated his tactical choice and sought to reopen the proceedings to seek the special relief he previously disavowed. The Attorney General properly refused to countenance such manipulation of the administrative process.

This Court has repeatedly held that whether to grant a motion to reopen deportation proceedings under applicable regulations is committed to the Attorney General's discretion. *Abudu*, 485 U.S. at 105-106; *INS* v. *Rios-Pineda*, 471 U.S. 445, 449 (1985); *INS* v. *Phinpathya*, 464 U.S. 183, 188 n.6 (1984); *INS* v. *Jong Ha Wang*, 450 U.S. 139, 143-144 n.5 (1981). As a general rule, courts may not

order reopening of any administrative proceeding "except in the most extraordinary circumstances," *Abudu*, 485 U.S. at 107 n.11, upon "a showing of the clearest abuse of discretion." *United States* v. *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535 (1946). And "the reasons for giving deference to agency decisions on petitions for reopening or reconsideration in other administrative contexts apply with even greater force in the INS context." *Abudu*, 485 U.S. at 110. The court of appeals failed to respect these principles here, since the Attorney General's refusal to allow reopening plainly did not involve the "unreasoned or arbitrary exercise of discretion." *Rios-Pineda*, 471 U.S. at 451.

a. The court of appeals believed that reopening was required in light of two events—Attorney General Meese's rejection of respondent's designation of Ireland as the country of deportation and passage of the Irish Extradition Act. App. 12a-15a. Neither of these legal developments (one in the United States and one in Ireland) constituted newly discovered and material *evidence*, much less evidence of persecution in the *United Kingdom*, where respondent is to be deported under the Attorney General's orders. Since neither development went to the merits of an asylum or withholding of deportation claim—and therefore would not have changed the outcome even if respondent had filed such a claim in a timely manner—Attorney General Thornburgh was entirely justified in rejecting them as new evidence warranting reopening. See *Taylor* v. *Illinois*, 484 U.S. 400, 414 & n.18 (1988) (new trial granted only if newly discovered evidence probably would change the outcome), cited with approval in *Abudu*, 485 U.S. at 110.

The court of appeals also viewed Attorney General Meese's decision and the Irish Extradition Act as furnishing a "reasonable explanation" for respondent's failure to

apply for asylum or withholding of deportation at an earlier date. App. 13a, 14a; see *Abudu*, 485 U.S. at 104-105. This holding was also wrong. As Attorney General Thornburgh explained, it is doubtful that the Attorney General's invocation of his express statutory authority to reject an alien's designation of a country of deportation could ever constitute the sort of "new" development justifying reopening; but it clearly was not such a development in this case, since respondent was aware of the INS's opposition to his designation when he waived his right to apply for asylum and withholding of deportation. App. 58a-59a. Moreover, Attorney General Meese's rejection of respondent's designation (which the court of appeals *sustained*) was nothing more than the final decision in the administrative proceedings concerning respondent's deportation. The end of a proceeding cannot be considered a new development justifying reopening of that very proceeding. As Attorney General Thornburgh explained, if an adverse final decision in a proceeding were itself sufficient to justify reopening, "there could never be finality in the process," *id.* at 67a, and "the regulatory process could be manipulated at will." *Id.* at 81a. Thus, here, as in *Rios-Pineda*, the denial of reopening was proper because it "was grounded in legitimate concerns about the administration of the immigration laws." 471 U.S. at 451-452.

The 1987 Irish Extradition Act likewise did not furnish a legally sufficient justification for reopening. While a change in the provisions of the *United States'* immigration laws might justify reopening of a deportation proceeding if it alters the legal standards that directly govern the case (cf. *Abudu*, 485 U.S. at 103 n.8), any change in *Irish* law wrought by the 1987 Extradition Act had no such effect on the legal standards governing respondent's deportation or his eligibility for asylum or withholding of deportation—

especially since under the orders of both Attorneys General, respondent will be deported to the United Kingdom, not Ireland. App. 69a-70a, 74a.

Furthermore, the Attorney General found that the 1987 Extradition Act was but the final step in a widely publicized process of extradition law reform in Ireland going back to 1985, and that, as respondent stated on at least four occasions in these proceedings, he was extraditable from Ireland to the United Kingdom even before the 1987 Act was adopted. App. 67a-69a & n.25, 70a-71a. Thus, at most, the 1987 Act confirmed the possibility that respondent would ultimately be returned to the United Kingdom even if he were first deported to Ireland. *Id.* at 41a (Lumbard, J., dissenting). The court of appeals did not dispute the Attorney General's assessment of the practical significance of the new Irish Extradition Act, and that assessment is in any event subject to review only for abuse of discretion. *Abudu*, 485 U.S. at 111. Accordingly, even if we assume that the Attorney General would have been required to take a truly new and unforeseen development in Irish law into account in deciding whether to reopen the proceedings, he did not abuse his discretion in declining to do so on the basis of the 1987 Extradition Act.

At bottom, respondent seeks to reopen his deportation proceedings because some of the legal and factual circumstances he anticipated at the time he waived his right to asylum and withholding of deportation (and conceded his deportability) did not come to pass. This will not do. Reopening requires more than an explanation of an alien's motivations for his tactical choices; it requires a legally sufficient justification. As Attorney General Thornburgh (and Judge Lumbard in dissent) observed, respondent is in the same position as a criminal defendant who pleaded guilty in the hope that the judge might impose a lenient sentence or on an understanding of the law that, while

reasonable, later proves to be erroneous. The criminal defendant has no right to withdraw his plea in those circumstances, if it was voluntarily given on the basis of competent advice. Respondent likewise has no right to repudiate his waiver and have his case reopened. See App. 39a-41a, 81a & nn. 39, 40 (citing *United States* v. *Broce*, 488 U.S. 563 (1989), and *Brady* v. *United States*, 397 U.S. 742, 757 (1970)).[17]

b. The Attorney General declined to reopen the proceedings to permit respondent to apply for withholding of deportation for the additional reason that even if respondent were able to show that he meets the basic eligibility standard in Section 243(h)(1), he would not ultimately be entitled to that relief. Withholding of deportation is unavailable if the Attorney General makes any one of four possible determinations under Section 243(h)(2). Attorney

[17] In support of his motion to reopen, respondent also submitted a 1988 report by Amnesty International (C.A. App. 452-455, 511-558), a book on which that report drew (*id.* at 559-709), and an affidavit of his mother, accompanied by newspaper articles (*id.* at 407-418, 450). The BIA found this evidence material and sufficient, if unrebutted, to make out a "prima facie claim of a well-founded fear of persecution." App. 99a. The Attorney General, however, found that it did not warrant reopening because substantially all of it was "either cumulative of that [respondent] has previously presented, discoverable long ago, or not material in light of the evidence that was presented." App. 75a. Because the court of appeals held that Attorney General Meese's decision and the Irish Extradition Act constituted "new evidence" and a "reasonable explanation" for reopening, it did not decide whether the factual material submitted by respondent also satisfied that standard. *Id.* at 15a. For the reasons given by the Attorney General, *id.* at 74a-78a, it did not; at the very least, the Attorney General did not abuse his discretion in so holding. Although this issue might be left to the court of appeals to resolve (if necessary) on remand following a decision by this Court, we reserve the right to urge the Court to reach this issue and sustain the Attorney General's resolution of it if appropriate for a complete disposition of the case.

General Thornburgh made two such determinations on the basis of the record and respondent's admissions: (1) "there are serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside of the United States" (8 U.S.C. 1253(h)(2)(C)); and (2) respondent "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion" (8 U.S.C. 1253(h)(2)(A)).

The court of appeals overturned this ruling by the Attorney General as well, holding that where an alien establishes a prima facie case of entitlement to withholding of deportation and introduces previously unavailable, material evidence, "the attorney general simply has no discretion" to deny reopening on the ground that the alien would be ineligible for relief. App. 16a. Once again, the court impermissibly imposed rigid limitations on the Attorney General's discretion to "creat[e] official procedures for handling motions to reopen deportation proceedings so as readily to identify those cases raising new and meritorious considerations." *Jong Ha Wang*, 450 U.S. at 145. Where, as here, the record already developed in the case establishes a reasonable basis for concluding that the motion is not "meritorious"—whether because the alien does not satisfy a basic eligibility requirement or, as here, because an exception is applicable—it is entirely appropriate for the Attorney General to deny the motion. Cf. *INS* v. *Bagamasbad*, 429 U.S. 24, 25 (1976) ("agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"). As the Court explained in *Abudu*, the alien bears a "heavy burden" in seeking reopening, analogous to that of a defendant seeking a new trial based on newly discovered evidence. 485 U.S. at 109-110. Where the Attorney General concludes that the supposedly "new" evidence would probably not change the outcome because it does not rebut evidence already in the

record that renders the alien ineligible, the alien has not carried his burden. That was the case here.

As Judge Lumbard pointed out, respondent admitted all of the following facts at his 1984 extradition hearing (App. 43a-44a):

> He was an officer in the Provisional Irish Republican Army ("PIRA") and committed acts dangerous to others on behalf of the PIRA, which the United States Department of Justice has classified as a terrorist organization * * *. For example, in 1973, [respondent] was convicted of and imprisoned for a firearms violation. In 1974, he was convicted of and imprisoned for smuggling 80 pounds of explosives in a car hijacked by the PIRA. In 1980, he drove several of his PIRA confederates to a private Belfast house, while the van driver was held captive; took over the house and held hostage the family inside; and engaged in a firefight that resulted in the death of Captain Westmacott of the British Army.

These admissions fully support the Attorney General's conclusions, which were based on an exhaustive review of the record. App. 81a-91a. The Attorney General's determination that there are "serious reasons for considering that [respondent] has committed a serious nonpolitical crime outside the United States," 8 U.S.C. 1253(h)(2)(C), is amply supported by the evidence that he held a civilian family hostage, that he used a hijacked van while its civilian driver was held captive, and that he was convicted of firearms violations and smuggling explosives, as well as the fact that he took part in the killing of a British Army officer.[18] In addition, respondent's admission of an active

[18] A finding of "serious reasons for considering" under this provision is essentially a finding of probable cause. *McMullen* v. *INS*, 788 F.2d 591, 598 n.2, 599 (9th Cir. 1986). A finding of probable cause is typically made without an adversary hearing. There is no reason why

role in the PIRA, which is classified as a terrorist organization by the United States, is sufficient to support the Attorney General's other determination, *i.e.*, that he "assisted, or otherwise participated in the persecution of * * * person[s] on account of * * * political opinion." 8 U.S.C. 1253(h)(2)(A). See page 7, *supra*.

c. The court of appeals' second-guessing of the fully considered judgment of the Attorney General in his disposition of a matter that is so fully committed to his discretion should not be permitted to stand. Since the court of appeals has allowed respondent to avoid the consequences of his deliberate tactical choices, the result can only be to encourage manipulation of the adjudicatory process, delay final resolution of already-protracted deportation proceedings, and divert scarce administrative resources from more meritorious claims. When this procedural error is coupled with the court of appeals' fundamental error on the substantive standards governing asylum claims, review by this Court is plainly warranted.

the Attorney General may not draw on that familiar practice when considering the possible merit of a claim to withholding of deportation in the special setting of a motion to reopen a completed adjudication.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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